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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SBA

CV 09

3351

ELECTRONIC FRONTIER FOUNDATION,) Case No.

Plaintiff,

vs.

COMPLAINT FOR INJUNCTIVE
RELIEF FOR VIOLATION OF THE
FREEDOM OF INFORMATION ACT,
5 U.S.C. § 552

CENTRAL INTELLIGENCE AGENCY,)
DEPARTMENT OF HOMELAND)
SECURITY, DEPARTMENT OF DEFENSE,)
NATIONAL SECURITY AGENCY,)
DEPARTMENT OF JUSTICE, OFFICE OF)
THE DIRECTOR OF NATIONAL)
INTELLIGENCE, DEPARTMENT OF)
ENERGY, and DEPARTMENT OF STATE,)

Defendants.

INTRODUCTION

1
2 1. The Electronic Frontier Foundation (“EFF”) brings this action under the Freedom of
3 Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief to enforce its
4 right to disclosure of agency records from the Central Intelligence Agency, Department of
5 Homeland Security, Department of Defense, National Security Agency, Department of Justice,
6 Office of the Director of National Intelligence, Department of Energy and Department of State
7 (collectively “Defendants”). Specifically, Plaintiff seeks release of agency records concerning
8 Defendants’ reports to the Intelligence Oversight Board and/or to the Director of National
9 Intelligence as well as other agency records created pursuant to Executive Orders 12863 and
10 13462.
11

JURISDICTION

12
13 2. This Court has subject matter jurisdiction over this action and personal jurisdiction
14 over the parties under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
15

VENUE AND INTRADISTRICT ASSIGNMENT

16
17 3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.
18 § 1391(e).
19

20 4. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c)
21 and (d) because a substantial portion of the events giving rise to this action occurred in this district
22 and division, where Plaintiff is headquartered.

PARTIES

23
24 5. Plaintiff EFF is a not-for-profit corporation established under the laws of the State
25 of Massachusetts, with its headquarters in San Francisco, California and an office in Washington,
26 DC. EFF is a donor-supported membership organization that works to inform policymakers and
27 the general public about civil liberties issues related to technology, and to act as a defender of those
28

1 liberties. Specifically, EFF strives to protect the rights of free expression, freedom of the press, fair
2 use, anonymity, security, and privacy as they relate to computing and the Internet. EFF seeks to
3 inform the public on these issues through several means, including a frequently visited web site and
4 an online newsletter. In support of its mission, EFF frequently uses the FOIA to obtain and
5 disseminate information concerning the activities of federal agencies.
6

7 6. Defendant Central Intelligence Agency ("CIA") is an agency of the Executive
8 Branch of the United States government and an "agency" within the meaning of 5 U.S.C.
9 § 552(f)(1).

10 7. Defendant Department of Homeland Security ("DHS") is a Department of the
11 Executive Branch of the United States government and an "agency" within the meaning of 5
12 U.S.C. § 552(f)(1). The Office of the Inspector General ("OIG") and Office of General Counsel
13 ("OGC") are components within Defendant DHS.
14

15 8. Defendant Department of Defense ("DOD") is a Department of the Executive
16 Branch of the United States government and an "agency" within the meaning of 5 U.S.C.
17 § 552(f)(1). The Defense Intelligence Agency ("DIA") is a component within Defendant DOD.
18

19 9. Defendant National Security Agency ("NSA") is an Agency of the Executive
20 Branch of the United States government and an "agency" within the meaning of 5 U.S.C.
21 § 552(f)(1). NSA is a component within Defendant DOD.

22 10. Defendant Department of Justice ("DOJ") is a Department of the Executive Branch
23 of the United States government and an "agency" within the meaning of 5 U.S.C. § 552(f)(1). The
24 Federal Bureau of Investigation ("FBI") and Office of the Attorney General ("OAG") are
25 components within Defendant DOJ.

26 11. Defendant Office of the Director of National Intelligence ("ODNI") is an agency of
27 the Executive Branch of the United States government and an "agency" within the meaning of 5
28

1 U.S.C. § 552(f)(1).

2 12. Defendant Department of Energy (“DOE”) is a Department of the Executive Branch
3 of the United States government and an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

4 13. Defendant Department of State is a Department of the Executive Branch of the
5 United States government and an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

7 FACTS

8 The Intelligence Oversight Board

9 14. The Intelligence Oversight Board (“IOB”) coordinates the Executive Branch’s
10 intelligence oversight activities. Part of the President’s Intelligence Advisory Board (“PIAB,”
11 formerly the President’s Foreign Intelligence Advisory Board “PFIAB”), the IOB was created by
12 Executive Order 12334 on December 4, 1981.

13 15. One of the chief functions of the IOB is to review reports submitted by members of
14 the Intelligence Community, a group that includes each of the Defendants. *See* 50 U.S.C.
15 § 401a(4) (defining the “Intelligence Community”); Executive Order 12334, Sec. 2(a) (providing
16 that the IOB “[i]nform the President of intelligence activities that any member of the Board
17 believes are in violation of the Constitution or laws of the United States, Executive orders, or
18 Presidential directives[.]”).

19 16. From September 13, 1993 through February 29, 2008, Executive Order 12863
20 determined the responsibilities of the agencies reporting to the IOB. Section 2.4 of that Order
21 provided, in pertinent part:
22

23
24 Inspectors General and General Counsel of the Intelligence Community, to the
25 extent permitted by law, shall report to the IOB at least on a quarterly basis and
26 from time to time as necessary or appropriate, concerning intelligence activities
27 that they have reason to believe may be unlawful or contrary to Executive order or
28 Presidential directive.

17. On February 29, 2008, Executive Order 13462 replaced Executive Order 12863 and

1 significantly modified the intelligence oversight role of the IOB. The heads of departments and
2 agencies with components in the Intelligence Community are still required to “[r]eport to the
3 Intelligence Oversight Board [and the Director of National Intelligence] concerning any
4 intelligence activities of their organizations that they have reason to believe may be unlawful or
5 contrary to Executive order or Presidential directive,” although the reports are no longer required to
6 be submitted quarterly. Executive Order 12333, Sec. 1.7(d), as referenced by Executive Order
7 13462, Sec. 7(a)(i).

9 18. Executive Order 13462 also expanded the intelligence oversight role of the Director
10 of National Intelligence (“DNI”). The DNI now issues guidelines to agencies concerning which
11 activities must be reported to the IOB, reviews and summarizes agency reports to the IOB,
12 forwards information in those reports to the OAG to the extent that such activities involve possible
13 violations of Federal criminal laws, and works with the intelligence agencies concerned to ensure
14 that corrective action is taken. Executive Order 13462, Sec. 7.

16 EFF’s February 25, 2008 Freedom of Information Act Requests

17 19. On February 25, 2008, EFF faxed letters pursuant to the FOIA to the CIA, DHS’s
18 components OIG and OGC, DOD, DIA, NSA, FBI, ODNI, DOE and Department of State. The
19 letters requested disclosure of all reports submitted by each Defendant to the IOB pursuant to
20 Section 2.4 of Executive Order 12863 from January 1, 2001 through February 25, 2008.

22 20. EFF has received no response from Defendant CIA regarding the February 25, 2008
23 request. On June 18, 2009, EFF called the CIA’s FOIA Requester Service Center to check the
24 status of the request and to date has received no response.

25 21. Defendant DHS’s component OIG acknowledged receipt of EFF’s February 25,
26 2008 request by letter dated February 27, 2008. On April 1, 2008, DHS indicated that it had
27 combined EFF’s requests to OIG and OGC into a single request and that the DHS Privacy Office
28

1 would provide a unified response. On April 30, 2009, DHS issued its final response to the
2 February 25, 2008 request, producing 45 pages of responsive documents from the United States
3 Coast Guard (35 of which were partially redacted) and withholding 11 pages. On June 19, 2009,
4 EFF appealed DHS's determination. To date, EFF has received no response to its appeal.
5

6 22. EFF has received no response from Defendant DOD regarding the February 25,
7 2008 request. On June 18, 2009, EFF called DOD's FOIA Requester Service Center to check the
8 status of the request and to date has received no response.

9 23. Defendant NSA made an interim response to EFF's February 25, 2008 request by
10 letter dated June 8, 2009. Defendant NSA produced 238 heavily redacted pages of reports from the
11 NSA to the IOB through the first quarter of 2006. NSA indicated that it was still processing the
12 remaining IOB reports and that the partial release could be construed as a partial denial. NSA did
13 not indicate when it would finish processing EFF's request. On June 19, 2009, EFF appealed
14 NSA's partial denial of the February 25, 2008 request. To date, EFF has received no response to
15 its appeal.
16

17 24. EFF has received no response from Defendant DOD's component DIA regarding
18 the February 25, 2008 request. On June 18, 2009, EFF called DIA's FOIA Requester Service
19 Center to check the status of the request and was told that the request was being processed. DIA
20 did not indicate when it would finish processing EFF's request.
21

22 25. Defendant DOJ's component FBI acknowledged receipt of EFF's February 25, 2008
23 request by letter dated December 8, 2008 and indicated that it was searching for responsive
24 records. On June 18, 2009, EFF called FBI's FOIA Requester Service Center to check the status of
25 the request and to date has received no response.

26 26. EFF has received no response from Defendant ODNI regarding the February 25,
27 2008 request. On June 18, 2009, EFF called ODNI's FOIA Requester Service Center to check the
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1 status of the request and to date has received no response.

2 27. Defendant DOE responded in full to EFF's February 25, 2008 request and released
3 several hundred pages of responsive documents in their entirety and without redaction on January
4 12, 2009. EFF did not appeal DOE's response to the February 25, 2008 request and does not now
5 challenge that response.
6

7 28. EFF has received no response from Defendant Department of State regarding the
8 February 25, 2008 request. On information and belief, Defendant Department of State received
9 EFF's February 25, 2008 FOIA request via fax on February 25, 2008. On June 18, 2009, EFF
10 called and emailed the Department of State's FOIA Requester Service Center to check the status of
11 the request. On June 22, 2009 via email and again on July 6, 2009 over the phone, the Department
12 of State indicated in an email that it is unable to locate EFF's February 25, 2008 request.
13

14 EFF's February 13, 2009 Freedom of Information Act Request

15 29. On February 13, 2009 EFF faxed a letter pursuant to the FOIA to Defendant DOJ's
16 component OAG. The letter requested disclosure of all reports submitted to the OAG from the
17 IOB from January 1, 2007 to February 13, 2009, as well as records documenting any action or
18 response to such reports by the Attorney General or other Justice Department officials.
19

20 30. EFF has received no response from OAG regarding the February 13, 2009 request.

21 EFF's June 19, 2009 Freedom of Information Act Requests

22 31. On June 19, 2009 EFF faxed letters pursuant to the FOIA to the CIA, DHS's
23 components OIG and OGC, DOD, DIA, NSA, FBI, OAG, ODNI, DOE and the Department of
24 State. The letters requested disclosure of records created pursuant to that agency's role under
25 Executive Order 13462.

26 32. DHS's component OIG, DOD, FBI, OAG, ODNI, DOE and the Department of State
27 have each acknowledged receiving the June 19, 2009 request. No Defendant has released
28

1 documents responsive to the June 19, 2009 requests.

2 33. The FOIA provides that, upon receiving a request for records, an agency shall make
3 the records promptly available, shall determine within 20 working days after receipt of the request
4 whether to comply with the request, and shall immediately notify the person making the request of
5 the agency's determination and the reasons therefore. 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(A)(i),
6 (a)(6)(C). More than 20 working days have passed since Defendants received Plaintiff's February
7 25, 2008, February 13, 2009 and June 19, 2009 FOIA requests, and Plaintiff has received neither
8 determinations regarding those requests (other than from the NSA and DHS in response to the
9 February 25, 2008 requests, both of which have been appealed) nor any notice of the date on which
10 Defendants intend to make determinations regarding Plaintiff's requests. *See* 5 U.S.C. §
11 552(a)(6)(B)(i)-(ii).
12

13 34. The FOIA provides that, upon receiving the appeal of a denial or partial denial of a
14 FOIA request, an agency shall make a determination with respect to that appeal within 20 working
15 days. 5 U.S.C. § 552(a)(6)(A)(ii). More than 20 working days have passed since Defendants NSA
16 and DHS received Plaintiff's June 19, 2008 appeals regarding the February 25, 2008 requests.
17

18 35. The FOIA allows an agency to extend the time limit for issuance of a determination
19 by 10 additional working days when the agency provides written notice to the requesting party, sets
20 forth "unusual circumstances" for the extension, and provides a date by which the agency expects
21 to dispatch its determination. 5 U.S.C. § 552(a)(6)(B)(i). In the present case, no Defendant has
22 fulfilled the requirements for such an extension.
23

24 36. On information and belief, each Defendant and component named herein received
25 the FOIA requests and appeals on the dates Plaintiff transmitted them by fax.

26 37. Plaintiff has exhausted all applicable administrative remedies.

27 38. Defendants have wrongfully withheld the requested records from Plaintiff.
28

CAUSE OF ACTION

**Violation of FOIA for Failure to Make Promptly Available
Records Sought by Plaintiff**

39. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1 through 38 above, inclusive.

40. Plaintiff has a legal right under the FOIA to obtain the agency records it requested from Defendants on February 25, 2008, February 13, 2009 and June 19, 2009, and there exists no legal basis for Defendants' failure to make available such records.

41. Defendants' failure to make available the records sought by Plaintiff in a timely manner violates the FOIA, 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(A)(i), and (a)(6)(C).

42. Defendants NSA's and DHS's failures to respond to Plaintiff's appeals in a timely manner violates the FOIA, 5 U.S.C. § 552(a)(6)(A)(ii).

43. Plaintiff has exhausted all applicable administrative remedies with respect to Defendants' wrongful withholding of the requested records. 5 U.S.C. § 552(a)(6)(C)(i).


44. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents. 5 U.S.C. § 552(a)(4)(B).

1 WHEREFORE, Plaintiff prays that this Court:

- 2 1. Order Defendants to disclose the requested records in their entireties and make
3 copies available to Plaintiff;
4
5 2. Expedite this action pursuant to 28 U.S.C. § 1657(a);
6
7 3. Award Plaintiff its costs and reasonable attorneys' fees pursuant to 5 U.S.C.
§ 552(a)(4)(E); and
8
9 4. Grant such other relief as the Court may deem just and proper.

10 Dated this 22nd day of July, 2009.

11 Respectfully submitted,

12 

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